View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by St. John's University School of Law

St. John's Law Review

Volume 47
Number 3 *Volume 47, March 1973, Number 3*

Article 23

August 2012

CPLR 7503(c): Requirement that Application for Stay of Arbitration Be Made Within Ten Days of Notice of Intention to Arbitrate Held Inapplicable Where Respondent Concealed Material Fact in Order to Create Coverage Under Insurance Policy

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1973) "CPLR 7503(c): Requirement that Application for Stay of Arbitration Be Made Within Ten Days of Notice of Intention to Arbitrate Held Inapplicable Where Respondent Concealed Material Fact in Order to Create Coverage Under Insurance Policy," *St. John's Law Review*: Vol. 47 : No. 3 , Article 23.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol47/iss3/23

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

The above recommendation should be enacted to foster the speedy resolution of controversies by arbitration.

CPLR 7503(c): Requirement that application for stay of arbitration be made within ten days of notice of intention to arbitrate held inapplicable where respondent concealed material fact in order to create coverage under insurance policy.

In *State Farm Mutual Automobile Insurance Co. v. Isler*,[192] an automobile liability insurer applied to stay arbitration which the respondent had demanded pursuant to CPLR 7503(c). Although the petitioner did not comply with the section's ten-day preclusionary rule[193] for an application to stay arbitration, the Appellate Division, Second Department, allowed the application because the respondent had concealed a "material fact" and attempted to create coverage. The undisclosed fact was that he had settled with another insurer for damages arising out of the same accident, thereby terminating coverage under the insurance agreement with the petitioner.[194]

The instant decision is one of several recent opinions which hopefully will engender a liberalization of the traditionally literal and exacting construction which CPLR 7503(c) has experienced. The ten-day period has been construed as a statute of limitations,[195] depriving the

1946) (defense to legal action and appeal from adverse determination deemed inconsistent with asserted intent to arbitrate and thus a waiver and abandonment).

192 38 App. Div. 2d 966, 331 N.Y.S.2d 547 (2d Dep't 1972) (mem.).

193 If the petitioner does not apply to stay arbitration within ten days, he may not assert inarbitrability in subsequent judicial proceedings, provided that the ten-day time limit is contained in the notice of intention to arbitrate. The provision is designed to settle the threshold questions relating to arbitration as soon as possible so that the proceeding may continue uninterrupted.

194 38 App. Div. 2d at 967, 331 N.Y.S.2d at 549. In so holding, the court declined to decide whether, absent such concealment, the insurer would have been precluded from raising the issue of coverage. *Id.*

Under the standard uninsured motorist endorsement, the parties agree to arbitrate "whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof." The Court of Appeals, in Rosenbaum v. American Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 677, 229 N.Y.S.2d 375 (1962), interpreted the arbitration clause as encompassing only the questions of the negligence of the uninsured motorist and the extent of recoverable damages should such negligence be determined. The status of a person as "insured" within the purview of the arbitration clause has been held to be a condition precedent to arbitration, to be established in a judicial proceeding rather than before the arbitrator. *See* Stanley v. MVAIC, 20 App. Div. 2d 877, 248 N.Y.S.2d 630 (1st Dep't 1964) (mem.); McGuinness v. MVAIC, 32 Misc. 2d 949, 225 N.Y.S.2d 361 (Sup. Ct. Queens County 1962); Allstate Ins. Co. v. Smith, 26 Misc. 2d 859, 207 N.Y.S.2d 645 (Sup. Ct. N.Y. County 1960). *See also* 7 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 122-41 (1966); Smith, *Handling Uninsured Motorist Claims in New York*, 32 ALBANY L. REV. 96 (1967).

195 *See* Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 760 (1970).

courts of any discretion to extend it.[196] It has also been held that the parties themselves cannot extend the period by agreement.[197]

Almost invariably, inattention to the form required by CPLR 7503(c), with respect to both the notice of intention to arbitrate and the application for a stay, is fatal.[198] However, the Second Department, in *Liberty Mutual Insurance Co. v. Granelli*,[199] recently ignored alleged technical defects in the demand which were "at most nonprejudicial irregularities which should be disregarded."[200]

This shift in attitude is a welcome one among harried practitioners who have experienced the often burdensome results of rigid application of the section. The First Department is also so inclined, as evidenced by *Empire Mutual Insurance Co. v. Levy*.[201] Therein, the respondent utilized the notice of intention to arbitrate so as to prevent compliance with the ten-day provision by the petitioner. The court refused to allow such manipulation and granted the stay. Although the holding was limited to the facts, one may infer that courts will be increasingly sensitive to the equities in particular situations.

CPLR 7511(a): Date of actual delivery of arbitration award must be stated in pleading ninety-day statute of limitations.

CPLR 7511(a) provides that a party moving to vacate or modify an arbitration award must do so within ninety days after its delivery to him. In *Ganser v. New York Telephone Co.*,[202] the Appellate Division, First Department, considered a petition to set aside an arbitration award rendered on April 30, 1971. The date of delivery of the award was not alleged or otherwise indicated. The original petition, filed on July 27, 1971, was followed by a motion noticed on August 24, 1971. The Supreme Court, New York County, dismissed the petition on the ground that more than ninety days had elapsed from the date of the award before the motion to vacate was made. The Appellate Division, First Department, reversed, strictly construing CPLR 7511(a) to require that

196 *See* CPLR 201.

197 *See* General Acc. Fire & Life Assur. Corp. v. Cerretto, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (mem.), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 768 (1970).

198 *See, e.g.*, Chasin v. Chasin, 37 App. Div. 2d 839, 326 N.Y.S.2d 151 (2d Dep't 1971) (mem.); State Farm Mut. Auto. Ins. Co. v. Szwec, 36 App. Div. 2d 863, 321 N.Y.S.2d 800 (2d Dep't 1971) (mem.); Liberty Mut. Ins. Co. v. Keane, 28 App. Div. 2d 703, 280 N.Y.S.2d 972 (2d Dep't 1967) (mem.); Napolitano v. MVAIC, 26 App. Div. 2d 757, 272 N.Y.S.2d 220 (3d Dep't 1966) (mem.); Allstate Ins. Co. v. Neithardt, 24 App. Div. 2d 941, 265 N.Y.S.2d 128 (1st Dep't 1965) (mem.).

199 37 App. Div. 2d 113, 322 N.Y.S.2d 390 (2d Dep't 1971).

200 *Id.* at 115, 322 N.Y.S.2d at 392 (dictum).

201 35 App. Div. 2d 916, 316 N.Y.S.2d 24 (1st Dep't 1970) (mem.), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 536, 549 (1971).

202 39 App. Div. 2d 653, 331 N.Y.S.2d 914 (1st Dep't 1972) (mem.).